How Public is a Public Inquiry?

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Abstract

Public inquiries convened by ministers into matters of public concern are major instruments of accountability within the administrative justice system. This article examines the tensions between the demand for public scrutiny of public inquiries and open justice on the one hand and conflicting pressures such as the protection of individual privacy and national security on the other. With reference to the Bristol Royal Infirmary, the Iraq Inquiry, the Undercover Policing and Azelle Rodney Inquiries and others, and drawing comparisons with the civil and criminal court systems, it looks at examples of inquiries with very different degrees of openness. The article analyses the key elements that comprise open justice in the public inquiry process and the methods by which restrictions are imposed on those elements. Openness is not always possible, however, the article argues that each time a concession is made against openness, there is a real risk that public confidence in the public inquiry process, and thereby the effectiveness of that process, is diminished. Finally, the article argues that the power of the minister to impose restrictions on public access, and perceptions of undue secrecy and ministerial interference, significantly exacerbates the undermining of public scrutiny and public trust in the independence and integrity of public inquiries.

Introduction

"Public inquiry" is a term often used to refer to a wide range of types of inquiry held by public or private bodies or persons. Such investigations range from planning and highways inquiries, investigations into industrial accidents, to inquiries dealing more broadly with issues of public policy reform. This article is concerned specifically with those public inquiries that are convened by a minister into matters of public concern. They are a major instrument of accountability and an important component of our administrative justice system, alongside courts, inquests, tribunals, the ombudsman and auditors.

Calls for this type of public inquiry are frequently made following events causing national concern, such as institutional child abuse, the war in Iraq, undercover police operations, the culture, practices and ethics of the press and a disaster with large scale loss of life.[2] Their role is to establish facts and address public concern, either by allaying it by showing that it is misplaced or, if justified, by for example pronouncing its view on culpability; learning lessons; providing catharsis; and making recommendations to

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[2] *The Independent Inquiry into Child Sexual Abuse*, *North Wales Child Abuse*, *Iraq* (*Chilcot*), *Undercover Policing*, *Leveson* and the *Grenfell Tower Inquiries* respectively

prevent recurrence.[3] Public inquiries, however, have no power to determine civil or criminal liability.[4]

The term "public" is often misleading. "Public inquires" may be held entirely in public, but may also be held in private, or consist of a combination of the two. The Inquiries Act 2005 was introduced to repeal the numerous pieces of statutory provisions relating to public inquiries and replace them with a single piece of legislation.[5] Where public inquiries are convened under the Inquiries Act 2005 ("the 2005 Act") there is a presumption that they will be held in public.[6] However, restrictions may be imposed by the minister or the chair to the inquiry, where it is deemed necessary.[7] The Act does not preclude a minister choosing to convene an inquiry outside the statutory framework.[8] Concern has been expressed that, on occasions, ministers are choosing to 'sidestep' the 2005 Act and to set up non-statutory inquiries, in order to restrict the extent of public scrutiny.[9]

This article examines both statutory and non-statutory inquiries. It considers the principles of political openness and open justice and explores the application of those principles to the public inquiry process. Drawing comparisons with the civil and criminal court system it examines the tensions between the demand for public scrutiny and open justice on the one hand and conflicting pressures such as privacy, the risk of death or injury, or the risk to national security on the other. With reference to the *Bristol Royal Infirmary Inquiry*, the *Iraq Inquiry,*[10] *the Undercover Policing and Azelle Rodney Inquiries* and others, it explores examples of inquiries with very different degrees of openness. The article reviews the key elements that comprise open justice in the public inquiry process and the methods by which restrictions are imposed on those elements. The article contends that each time a concession is made against openness, there is a real risk that public confidence in the public inquiry process, and thereby the effectiveness of that process, is diminished. Finally, the article argues that the power of the minister to impose restrictions on public access and public scrutiny, and perceptions of undue secrecy and ministerial interference, significantly exacerbates the undermining of public trust in the independence and integrity of public inquiries.

A Hybrid Process

Public inquiries are part of the political process rather than the legal process.[11] The report ultimately produced by a public inquiry is delivered to the minister who convened

[3] See Michael Collins, Judi Kemish and Ashley Underwood QC written evidence to the House of Lords Select Committee on the Inquiries Act 2005 para 7 www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf .
Other functions include developing public policy and discharging the Government's obligations to investigate alleged breaches of Articles 2 and 3 of the European Convention on Human Rights; see list in Jason Beer et al, *Public Inquiries* (OUP 2011) para 1.02- 1.10

[4] Inquiries Act 2005, s2

[5] HL Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 31 identifies arguably two statutory provisions, relating to Health and Safety at Work and Financial Services, that might continue to apply independently of the 2005 Act.

[6] 2005 Act, s18

[7] ibid s19 (eg to protect national security or otherwise in the public interest)

[8] Such as the *Iraq Inquiry* and the *Mid Staffordshire NHS Foundation Inquiry*

[9] An issue I have explored in some detail in an earlier article: Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67,2 NILQ 209-229

[10] Known also as the *Chilcot Inquiry*

[11] That position being confirmed in the 2005 Act, s(1) "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability" see also the discussion in Sir Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday*(Hart 2017) 50

the inquiry and is subsequently laid before Parliament. Its recommendations are not legally binding. Where a Government refuses to implement the recommendations of a public inquiry, any influence or pressure brought to bear on that decision derives from political pressure from Parliament, the public, the media and others, such as non-governmental organisations (NGOs), survivors and their families. By holding a public inquiry in public, as well as placing its finding and recommendations in the public sphere, it opens the process up to public scrutiny, enabling the public to form its own judgements on the subject matter of the inquiry and on the process itself and, thereby, hold the Government to account.

On the other hand, public inquiries are also quasi-judicial bodies, analysing large quantities of evidence, establishing fact and determining accountability. The procedure and conduct of a public inquiry is not prescribed but is determined by the chair of the inquiry when the inquiry is convened.[12] In general terms, the rules of evidence in civil and criminal proceedings do not apply. However, in many ways, the powers and procedures of public inquiries resemble those of a court process. Evidence may be taken during oral hearings; many public inquiries have the power to take evidence on oath and to compel witnesses to give evidence; [13] and principles such as public interest immunity and common law and statutory duties of fairness to witnesses are applied. Some public inquiries are held in court buildings.[14] The majority of public inquiries are chaired by a judge, retired judge or senior member of the legal profession, with Counsel and a Solicitor to the Inquiry appointed, further reinforcing their resemblance to court processes.[15] If a public inquiry is to allay public concern, and if the public is to have confidence in its quasi-judicial process, it must be open and seen to be procedurally and substantively fair in the same way as for the civil and criminal court processes.

Public inquiries may be thought of therefore as a hybrid of a political and legal process, both procedurally and also in their aims "between the assumptions of law - that truth can be uncovered and justice delivered; and of politics - that social debate and audit will help society improve its workings." [16] Within the political process, if the Government and those in authority are to be held to account, openness and transparency, one of the Seven Principles of Public Life devised by the Committee on Standards in Public Life,[17] are essential. Within the legal process, openness and transparency are embedded within the principle of open justice.

Open Justice and Political Openness

Open justice, the principle whereby legal proceedings are open to the public and may be freely reported by the press, was described by Lord Neuberger, as "a fundamental feature of the rule of law in any modern democratic society".[18] It is a constitutional principle that has been recognised for centuries,[19] is deeply rooted in common law

[12] 2005 Act, s17(1)
[13] Ibid ss21 and 17 respectively
[14] Such as the Leveson Inquiry
[15] Some are chaired by senior civil servants or experts from outside the legal profession, chosen for their expertise in the subject matter of the inquiry or the in the operation of the public body concerned.
[16] CEDR *"Guidance for Chairs and Commissioning Bodies*" <www.cedr.com/docslib/PI_Guide.pdf>
[17] (May 1995) www.gov.uk/government/publications/the-7-principles-of-public-life Also known as the Nolan Principles.
[18] Statement 2 October 2013 quoted in Joshua Rozenburg, 'Open justice rises up the agenda' *The Guardian* (London, 4 October 2013)
[19]Toulson LJ R. (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court (Article 19 intervening); Guardian News and Media Ltd v. Government of the United States of America [2012] EWCA Civ 420; [2013] Q.B. 618

systems and has been incorporated into a number of written constitutions such as those of the United States and Ireland.[20] It is also a fundamental principle enshrined in Article 6(1) European Convention on Human Rights ("ECHR").[21] There are key tensions, however, between the demand for open justice and other conflicting pressures. For example, hearings in the family division are regularly heard in camera to protect individuals' privacy; closed material procedures[22] are used in civil proceedings to protect issues of national security.

The principle of open justice was clearly affirmed the case of *Scott v Scott*,[23] an appeal against an order of contempt of court, following the disclosure to a third party of notes of a family hearing that had been heard in camera. Lord Acton stated:

> "The hearing of a case in public may be, and often is, painful, humiliating, or deterrent, both to parties and witnesses… but all this is tolerated and endured because it is felt that in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, and the best means of winning for it public confidence and respect."[24]

Viscount Haldane noted that there are common law exceptions to the broad principle, but they must be justified by some more important principle, the chief exception being the interests of justice.[25] Lord Shaw, went further and looked at open justice in the context of the constitutional heritage of a free country, quoting the philosopher Jeremy Betham (1748—1832) on the importance of publicity in safeguarding justice:

> ""In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity"

Quoting the constitutional historian Henry Hallam (1777-1859), who stressed the role of open legal and political processes in protecting civil liberty:

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances…"[26]

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[20]The Sixth Amendment of the Constitution of the United States of America and Article 34.1 Constitution of Ireland

[21] (The right to a fair and public hearing) though it is subject to any Act of Parliament expressly overriding that right Human Rights Act 1998, s3(1)

[22] Under the Justice and Security Act 2013

[23] [1913] AC 417

[24] Lord Atkinson ibid

[25] "… the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done." Viscount Haldane LC in Scott v Scott 437-439 (n15). See the general principle on exceptions expounded by Lord Diplock in *Attorney General v Leveller Magazine Ltd [1979] AC 440* , 449–450 See also Lord Woolf in R v Legal Aid Board exp Kaim Todner [1999] QB 966, 976 "an exception can only be justified if it is necessary in the interests of the proper administration of justice"

[26] Shaw v Shaw (n15) 477; see also Lord Thomas in *Guardian News v Erol Incendal [2016] EWCA Crim 11*" the principle of open justice is fundamental to the rule of law and to democratic accountability"

The principle of open justice does not apply in the same way to public inquiries as it does to the courts. There is no legal presumption in favour of a fully open inquiry.[27] In the case of *Kennedy v The Charity Commission*[28] the Supreme Court applied the common law principles of open justice to the proceedings of a quasi-judicial inquiry. The case centred on an appeal against a decision that the Charity Commission was not required to disclose, under the Freedom of Information Act 2000, documents concerning an inquiry it had conducted and on the effect of Article 10 ECHR.[29] The inquiry in question was held in private and was conducted under subject-specific legislation, but in its judgment, the court also considered inquiries conducted by ministers into matters of public concern under the Inquiries Act 2005.

Lord Toulson concluded that the considerations that underlie the open justice principle in relation to judicial proceedings apply also to quasi-judicial inquiries and hearings, stating "How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?"[30] He went on:

> "The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle."[31]

A public inquiry may be necessary to discharge the Government's obligation to conduct an effective official investigation into allegations of breach of Articles 2 and 3 ECHR, the right to life and prevention of torture or of inhuman or degrading treatment or punishment respectively.[32] To be effective, an investigation must have "a sufficient element of public scrutiny to ensure practical accountability…" [33] However, public scrutiny is not an automatic requirement and it does not require all proceedings to be in public. The test is "whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[34] Case law suggests "the more serious the events that call for inquiry, the more intensive should be the process of public scrutiny."[35]

The extent to which public inquiries are open to public scrutiny will therefore vary from one inquiry to another, according to its nature and subject matter, with the decision resting in part with the minister convening the inquiry and in part with the chair to the

[27] R (Persey) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 371 (Admin) [2003] QB 794
[28] 2014 UKSC 20, [2015] 1 AC 455
[29] The right to Freedom of Expression including include the freedom to receive and impart information and ideas without interference by public authority
[30] 2014 UKSC 20, [2015] 1 AC 455 para 124
[31] Ibid para 125
[32] "Everyone's right to life shall be protected by law" and "No one shall be subjected to torture, or to inhuman or degrading treatment or punishment." respectively
[33] See Lord Bingham's summary in *R (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 A.C. 653 on the Zahid Mubarek Inquiry**,** a non-statutory inquiry
[34] Ramsahai v Netherlands (2008) 46 EHRR 43 para 353
[35] R (Khan) v Secretary of State for Health [2003] EWCA Civ 1129 para 62.

inquiry. Such decisions have generated much criticism and debate and have been the subject of a number of judicial review cases.[36]

The Choice: Public or Private

The decision as to whether or not to convene an inquiry and, if so, whether it will be a public inquiry is one for the minister whose department is most relevant to the matter of public concern necessitating the inquiry. Once convened, how much of that inquiry will be held in public, and will be open to public scrutiny, will be determined by both that minister and the chair of the inquiry. The Government offered five main reasons that it said justified holding proceedings in private when it gave evidence to the 2004-5 House of Commons Public Administration Select Committee. These were: national security; statutory barriers to disclosure and legal and commercial confidentiality; personal privacy; unnecessary intrusion or distress to witnesses; and simpler, faster procedures.[37]

Another reason that has been put forward in favour of private rather than public inquiries is that it may be easier to elicit the truth from witnesses when questioning is away from the full glare of publicity as it might encourage witnesses to speak more openly and frankly.[38] However, many argue the advantages of witnesses giving evidence in public outweigh the disadvantages. Lord Justice Kennedy in *R (Wagstaff) v Secretary of State for Health*[39] stated:
"There are positive known advantages to be gained from taking evidence in public, namely—
(a) witnesses are less likely to exaggerate or attempt to pass on responsibility:
(b) information becomes available as a result of others reading or hearing what witnesses have said:
(c) there is a perception of open dealing which helps to restore confidence:
(d) there is no significant risk of leaks leading to distorted reporting."

Beer provides a comprehensive list of advantages of conducting an inquiry in public.[40] It includes additional points such as: enhancing public confidence in the process, conclusions and recommendations; enabling the public to form its own conclusions on the subject matter of the inquiry; and assisting in discharging a state's investigative obligations in cases where Articles 2 and 3 of the ECHR are engaged and defeating arguments of violation of rights under Article 10 ECHR. However, Beer points out that a risk of conducting an inquiry in public is that of adversely affecting the interests and reputations of individuals and organisations by airing, in public, allegations that might eventually turn out to be false.[41]

Holding a public inquiry as openly and publicly as possible is key for participants, such as survivors and their families, families of victims, NGOs and pressure groups, who are

[36] See R v Secretary of State for Health, ex parte Crampton (CA, 9 July 1993) (the *Allitt Inquiry*); R v Secretary of State for Health, ex parte Wagstaff; R v Secretary of State for Health ex parte Associated Newspapers Ltd [2001] 1 WLR 292 (the *Shipman Inquiry*); R (Persey) v Secretary of State for Environment, Food and Rural Affairs (n18) (the *Foot and Mouth Inquiry*).
[37] HC 606-ii, GBI 09, Ev 39
[38] The Annual Report of the Council of Tribunals for 1995/96 HC (1996-97) 114 or Public Administration Select Committee First Report 2004-5
[39] [2001] 1 WLR 292
[40] Jason Beer et al, *Public Inquiries* (OUP 2011)paras 6.03
[41] Ibid para 6.04

anxious for a much and long sought-after opportunity for their voices to be heard.[42] On occasions, individuals or groups have refused to cooperate with a public inquiry where it was felt that it was insufficiently open and public.[43] It is also fundamental to democratic accountability. It allows the public to access to the same evidence as is used by the inquiry in its public hearings, to scrutinise the process, to draw their own conclusions and to seek, politically, to hold those in authority to account. As considered in more detail below, apparent undue secrecy can give rise to the perception that there is something to hide or that the decision to hold all or part of an inquiry is motivated by an attempt to avoid accountability.

Giving evidence to the 2013-14 House of Lords Select Committee on the Inquiries Act, *Professor Sir Ian Kennedy*, chair of the *Bristol Royal Infirmary Inquiry*[44] a pre-2005 Act inquiry, specifically recognised the role of political influence in the decision of whether to hold an inquiry in public, stating

> "ultimately the choice as to whether there is a public inquiry or not, given that one has that choice, will be a political choice. It will be a function of the degree of pressure and the generation of calls for one… In the Bristol inquiry, the first two options were a private within the hospital, and then a private outwith the hospital. Only when the pressure was such that the Secretary of State felt that it was irresistible was there a public inquiry." The Bristol Inquiry report concluded "Holding an Inquiry in private is more likely to inflame than protect the feelings of those affected by the Inquiry, not least because of the notion of secrecy and exclusion which it fosters."[45]

Two Contrasting Case Studies in Openness: The Bristol Royal Infirmary and the Iraq Inquiry

In his earlier published lecture,[46] *Public Inquiries: Experiences from the Bristol Public Inquiry,* Professor Sir Ian Kennedy described the public nature of the Inquiry. "The Inquiry worked in the open. What it saw and heard by way of evidence, the public saw and heard. There can be no more simple, yet demanding, principle of accountability. The evidential basis on which any view reached by the Panel was arrived at was made explicit. In this way, any view could be challenged."

Unlike the court system, there is no permanent venue for public inquiries and, once an inquiry is convened, the chair must choose its location and premises. Some inquiries are held in court buildings, but many are held in other types of premises such as government offices, council buildings and privately owned buildings.[47] Ian Kennedy described the amount of specific thought given to public accessibility and media access,

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[42] Ashley Underwood, oral evidence taken before the HL Select Committee (20 November 2013) Q251 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>

[43] For example Amnesty International withdrew cooperation from the Detainee Inquiry into whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11, in part due to lack of transparency and that much of the Inquiry was to be held behind closed doors see <http://www.amnesty.org.uk/detainee-inquiry>

[44] Convened under National Health Service Act 1977, s84 conducted between October 1998 and July 2001 into the management of the care of children receiving complex cardiac surgical services

[45] Bristol Royal Infirmary *Learning From Bristol* (cmm 5207, 2001) para 6

[46] Lecture 7 February 2002: 'Public Inquiries: Experiences from the Bristol Public Inquiry' in J Carrier et al (eds), Law, Medicine and Ethics: Essays in Honour of Lord Jakobovits (London, Cancerkin, 2007) p30-36

[47] Eg the *Leveson*, *Al-Sweady*, *Mid Staffordshire NHS Foundation Inquiry* and the *Independent Jersey Care Inquiries* respectively

and the level of design and planning that went into the layout for the Bristol Public Inquiry in this respect, which was set up on three floors of an office block.

In contrast to court buildings, where the space available to members of the public may be very limited because of practical constraints, seating at the *Bristol Royal Infirmary Inquiry* was provided for more than 200 people within the hearing chamber and screens were set up in other rooms with simultaneous transmission of proceedings. The inquiry hearings were also transmitted to three additional remote locations.[48]

All of the evidence seen by the Inquiry was made public. Every document required by the Inquiry during the hearings was electronically scanned and displayed on television screens in the hearing chamber so that the public could see what the Inquiry could see, enhancing accountability and serving to "make real what, to the public, would otherwise be abstract discussions."[49] The transcript of each hearing was transmitted instantly to screens and a transcript of the day's hearing published within an hour of the hearings finishing on the Inquiry website, on which the statements of witnesses were also posted.

Recognising the important role the media has to play in 'taking the Inquiry to a wider public' dedicated facilities were set up for the press and broadcast media, including a room for television interviews and a news-room with state of the art technology. A dedicated team was set up to assist the media for example by providing briefings, clarification and press releases.

The *Bristol Royal Infirmary Inquiry* is not alone in its approach to openness and accessibility. Many public inquiries make widespread use of ever-advancing technology. Approaches to broadcasting have varied between inquiries.[50] Although broadcasting was refused during the *Bristol Royal Infirmary Inquiry*, out of regard for the witnesses and sensitivity of the subject matter, some public inquiries are now televised and streamed live over the internet. For example, the *Leveson Inquiry* was accessible in its entirety via televised broadcasting and live streaming.

Witnesses can be very nervous and find the prospect of appearing before a public inquiry and its teams of legal representatives, very intimidating.[51] Whilst the use of cameras and sound recording provide an objective view on proceedings, and means of checks, it can make the prospect even more intimidating and can result in witnesses being reluctant to come forward to give evidence. The trend, however, appears to be moving towards increased broadcasting of public inquiry hearings. Despite the highly sensitive nature of the Inquiry, Alexis Jay, the chair of the *Independent Inquiry into Child Sexual Abuse* stated "I am satisfied that the considerable arguments in favour of broadcasting outweigh those against it. I am confident that the Inquiry can take appropriate measures

[48] To enable families and others interested in the inquiry to follow the hearings without having to travel to Bristol.

[49] By comparison, we have also seen a significant increase in the use of technology in the court system, with increased utilisation of digital storage, case management systems and digital presentation, driven by the need, shared with the public inquiry process, to achieve greater time and cost efficiencies, and reduced reliance on hard copy documents. However, in contrast to the approach adopted at the *Bristol Royal Infirmary Inquiry* and other inquiries, in the court system, whilst documents will often be available electronically to lawyers, the witnesses and judge, they will not be available electronically to the public, which will be an onlooker of the process, but not the documents.

[50] See Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.76

[51] See, for example 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> Q118 and 122 (16 October 2013)

to preserve anonymity and mitigate the risks of broadcasting that have been identified."[52]

In contrast to the *Bristol Royal Infirmary Inquiry*, the *Iraq Inquiry* into the UK's involvement in the conflict in Iraq is an example of an inquiry in which there has been huge public interest and that has come under widespread criticism for its secrecy. When the Inquiry was announced, the intention was that the non-statutory inquiry, conducted by a committee of Privy Counsellors, would be held in private, for reasons of national security and speed.[53] There followed intense pressure from Parliament,[54] the public and the media for the Inquiry to be held in public. The Public Administration Select Committee on the Iraq Inquiry concluded that the decision to hold the Iraq Inquiry in private was "totally unsatisfactory"[55] adding "The need for effective accountability and public confidence demands that the inquiry be conducted as openly and publicly as possible... There needs instead to be a presumption in favour of the inquiry proceeding in an open and public manner. There should be only very limited exceptions to this general rule, which would be best decided by the members of the inquiry itself, not by the Government."[56]

When the then Prime Minister, Gordon Brown, asserted that a more open inquiry would be bad for the armed forces, he was contradicted by senior military figures. General Sir Mike Jackson, head of the Army during the Iraq invasion, stated:

> "I would have no problem at all in giving my evidence in public...The main problem with a secret inquiry...is that people would think there is something to hide."

Air Marshal Sir John Walker, the former head of defence intelligence, said:

> "There is one reason that the inquiry is being heard in private and that is to protect past and present members of this Government. There are 179 reasons why the military want the truth to be out."[57]

The Prime Minister later announced that that some of the hearings would be held in public, at the discretion of the chair, Sir John Chilcot, who then announced the Inquiry's commitment that hearings would be held in public wherever possible.[58] Ultimately most of the hearings were indeed held in public, the proceedings were streamed live and archive footage of each hearing session was made available via the Inquiry's website. However, despite this fact, there was still widespread media criticism of the scale of the private hearings when it was announced that 35 witnesses had been heard in private.[59]

At the outset of the Inquiry, the Government and the Inquiry agreed a documents protocol on the handling of information provided to the Inquiry, naming the Cabinet Secretary as final arbiter in discussions about disclosure.[60] The chair requested

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[52] Chair's Ruling on Broadcasting of Inquiry Proceedings in the *Janner*, *Anglican*, *Rochdale* and *Lambeth Investigations* 13 April 2016 <www.iicsa.org.uk/key-documents/593/view/Ruling%20on%20Broadcasting%20of%20Inquiry%20Proceedings.pdf> para 11-12

[53] HC Deb, 15 June 2009, cols 23-38

[54] William Hague, Shadow Foreign Secretary "proceedings of the Committee of Inquiry should whenever possible be held in public" HC Deb, 24 June 2009,vol 494, col 800

[55] Public Administration Select Committee *Iraq Inquiry* (2008-09, HC 721) p7

[56] Ibid p8

[57] Referring to the 179 British soldiers who died during the conflict. HC Deb, 24 June 2009, vol 494, col 810

[58] Sir John Chilcot already having written to Gordon Brown on 21 June 2009 stating his belief "that it would be essential to hold as much of the proceedings of the Inquiry as possible in public."

[59] See eg 'Iraq inquiry has heard from 35 witnesses in private' *BBC* News (8 July 2010) <www.bbc.co.uk/news/10558991> and Chris Ames, 'Chilcot inquiry succumbs to secrecy' *The Guardian* (8 July 2010) <www.theguardian.com/commentisfree/libertycentral/2010/jul/08/chilcot-inquiry-iraq-secret-witness>

[60] Available at <www.gov.uk/government/publications/iraq-inquiry-information-sharing-protocol >

publication of sensitive cabinet-level discussions and communications between the Prime Minister, Tony Blair, and President George W Bush, which the Inquiry judged were vital to the public's understanding of the Inquiry's conclusions. It took years of discussions with successive cabinet ministers before an agreement was finally reached to publish a small number of "gists and quotes", which the Inquiry deemed sufficient to explain their conclusions.[61]

The resulting delay in publishing the report (particularly its delay until after the May 2015 General Election) damaged public perception of the Inquiry, and prompted widespread allegations in the media of political interference and an "establishment fix-up", with politicians warning of "public incredulity" and the risk that public will assume the report is being "sexed down".[62] Sir John Chilcot was required to give evidence on the progress of the Inquiry to the Commons Foreign Affairs Committee. He strongly denied those allegations, stating the timetable had been prolonged by: the gravity of the subject matter; the huge scope of the Inquiry, covering decisions made over a nine year period; the complexity of advice, discussion and debate interlinked with those decisions; as well as the lengthy process of issuing warning letters.[63] However, by then, public confidence in the Inquiry had been undermined and the public perception of the Inquiry damaged. Each time a concession to secrecy is made during a public inquiry, there is a real risk that public confidence in the inquiry will diminish; the effect is cumulative.

Elements of Openness and Public Scrutiny and Capacity of Attendance

As these examples show, the extent to which public inquiries are open to public scrutiny goes beyond the issue of whether hearings are open to the public. In analysing the principle of open justice in the context of civil and criminal trials, Jaconelli concludes that open justice in the court system comprises six presumptive elements, which are discussed below.[64] They relate to attendance at proceedings; the availability of documents and the details of participants, including witnesses; and the proceedings taking place in the presence of the accused.

The relevance of those presumptive elements to openness and public scrutiny in the quasi-judicial public inquiry process, which in many ways resembles the court process, (adjusting for the fact there is no 'accused' in the public inquiry process) are illustrated by the case studies above and in the following discussion on restrictions. An additional presumptive element that needs to be added for public inquiries is the availability of the inquiry report for inspection by the public, also discussed below.

Jaconelli also draws a distinction between two different capacities in which attendance at trial may take place. The first is a person's presence at a trial as one of the *dramatis personae* described, for most purposes, as being "clearly and uncontroversial identified: the judge, the parties, their legal representatives, witnesses and jurors and the personnel of the court building". The second is described as "simply as a spectator", the

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[61] Letter from Sir John Chilcot to Sir Jeremy Heywood, cabinet Secretary, date 28 May 2014 <www.iraqinquiry.org.uk/media/185932/2014-05-28-letter-chilcot-to-heywood.pdf>

[62] See, eg Andrew Grice and James Cusick, 'Everyone wants the report published – but no one knows when' *The Independent (*London,24 February 2015); Michael Savage ' Chilcot will face MPs over delays to 'sexed down' Iraq war report' The Times (London 22 January2015) p 18; and Patrick Wintour and Nicholas Watt 'Chilcot report on Iraq war delayed until after general election' *the Guardian* (London, 21 January 2015) https://www.theguardian.com/uk-news/2015/jan/20/chilcot-report-iraq-war-delayed-general-election

[63] Evidence to the Foreign Affairs Select Committee 4 February 2015 at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html

[64] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OU Press 2002) p2-4

latter being the focus for the discussion of open justice.[65] Jaconelli expressly excludes Witness Support or Victim Support Schemes, stating they "undoubtedly rank as members of the public".

The demarcation in a public inquiry, an inquisitorial process rather than the adversarial system of court proceedings in the common law systems such as that of England and Wales, is not as clear. As an inquisitorial process, there are no parties to a public inquiry and no accused. In addition to the Chair of the inquiry, who may sit with a panel and may appoint assessors to advise and assist with technical issues in specialist fields, witnesses and legal representatives, there is also usually Counsel to the Inquiry, the Solicitor to the Inquiry, and the inquiry secretariat.

Further, some individuals or organisations have a particularly close connection with the work of a public inquiry. It may be that they have played a significant role in the issues being investigated by the inquiry and are likely to face severe criticism during the course of an inquiry's proceedings or in the report itself. It may be that they have a significant interest in the processes and outcome of the inquiry, and perhaps in trying to persuade the inquiry to reach a particular conclusion. They may be victims of the events under investigation or their family members, NGOs or campaigners, support groups, innocent bystanders or protagonists.

Such individuals or organisations may be formally recognised by the public inquiry and designated a privileged position within the process. Under the 2005 Act, they are known as core participants; in non-2005 Act inquiries they are generally referred to as 'interested parties' or 'full participants'. Such a designation is significant as this privileged status provides the primary means of direct access to the inquiry and involvement in, and contribution to, the process. Core participants may receive advance notice of evidence before it is published,[66] have the right to propose questions for Counsel to the Inquiry to ask witnesses, may apply to ask questions of a witness giving evidence[67] and may receive a copy of the final version of the report prior to publication. As such, they have the opportunity to anticipate or contribute to the direction of the inquiry or potentially deflect or manage any criticism that may be directed at them.

However, the appointment of such participants is discretionary. The Chair must act in accordance with their duty to act with fairness and, in the case of 2005 Act inquiries, their duty to avoid any unnecessary cost.[68] For 2005 Act Inquiries, applicants must meet the criteria under Rule 5(2) Inquiries Rules 2006 but that alone does not guarantee core participant status. Selection among qualifying applicants may well be necessary in order to ensure not only cost-effective but also time efficient management of an inquiry.[69] As a result, a person or organisation who feels they have a particularly close connection to the work of an inquiry, or feels they will be particularly affected by its outcome, may not be designated core participant or equivalent status.[70] The remedy for

[65] Ibid p16
[66] Albeit sometimes only hours or a few days
[67] Rule 10 Inquiry Rules 2006
[68] 2005 Act, s17(3)
[69] When exercising this discretion, the chair may take into account matters such as ensuring that those that are designated adequately and proportionately represent the range of different interests that are relevant to the inquiry's terms of reference and also the need to control the amount of information the inquiry can receive. See further discussion in Isabelle Mitchell, Sarah Garner and Peter Jones 'Public inquiries: a core participant - to be or not to be', *Insight* (7 July 2016)
[70] Some choose not to apply for this privileged status, for example to avoid unwelcome publicity or scrutiny or because of cost or time issues (ibid)

those who wish to be core participants but have not been designated as such is judicial review. However, in practice, such applications are very rare.[71]

Imposing Restrictions on Attendance at Hearings, the Right to Report and Access to Documents

The explanatory notes to the 2005 Act, recognising that there may be circumstances in which part or all of an inquiry must be held in private, state that over the previous 15 years, more than a third of the notable inquiries held had some sort of restrictions imposed on public access. These ranged from "wholly private inquiries, such as the Penrose inquiry into the collapse of Equitable Life and the "Lessons Learned" (Foot and Mouth) Inquiry, to mainly public inquiries such as the Bloody Sunday inquiry and the Hutton inquiry, in which a small amount of highly sensitive material was withheld from the public domain."[72]

Whilst, as explained above, there is no legal presumption in favour of a fully open inquiry, where inquiries are convened under the 2005 Act, s18 sets out a presumption that they will be held in public:
"Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—
(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."[73]
This is in contrast, for example, to the civil court system where the requirement for a hearing in public specifically does not require the court to make special arrangements for accommodating members of the public.[74]

However, s19 recognises that openness is not always possible.[75] It provides for the minister convening the inquiry, or chair to the inquiry, to impose restrictions on attendance at an inquiry and the disclosure or publication of evidence or documents. Restrictions are imposed by means of a restriction notice given by the minister to the chair or by restriction order made by the chair. A restriction on the disclosure or publication of documents or evidence continues indefinitely,[76] unless otherwise specified or the order or notice is varied or revoked.[77]

S19(3) provides that, when a statute, enforceable EU obligation or rule of law requires it, including the common law principle of fairness and public interest immunity, a restriction notice or order must be made.[78] In the absence of a such requirement, restrictions may

[71] Jason Beer QC, oral evidence before the HL Select Committee (16 October 2013) 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> Q117
[72] Explanatory Notes to the Inquiries Act 2005, para 38
[73] 2005 Act, s18(1)
[74] CPR 39.2 (2) Civil Procedure Rules 1998
[75] Read in conjunction with the provisions in 2005 Act, s20
[76] Compared with the Thirty Year Rule under Public Records Act 1958, s3 and the Freedom of Information Act 2000, whereby certain Government records are released after thirty years (currently being transitioned to twenty years). However, some Government records may be retained indefinitely under S3(4) Public Records Act 1958 where they are "required for administrative purposes or ought to be retained for any other special reason".
[77] 2005 Act, s20(5)
[78] Ibid, s19(3)

be made by the minister or chair as are considered to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest. Regard must be had to matters set out in s19(4)- (5) such as the allaying of public concern, the risk of death or injury, damage to national security, international relations or economic interests of the UK that could be avoided or reduced, issues of confidentiality, cost and delay to or impairment of the inquiry.[79]

Concern has been expressed that the potential scope of public interest is very broad and the minister or chair must only 'have regard' to those matters, nothing more. Further, whilst consideration must be given to the fact that a restriction order or notice may not be conducive to the fulfilment of an inquiry's terms of reference, it does not follow that it cannot be made. A minister or chair may therefore consider such an order or notice to be necessary in the public interest and impose restrictions, notwithstanding that the order would hamper fulfilment of the public inquiry's terms of reference.[80]

By contrast, where an inquiry is not convened under the 2005 Act and is a non-statutory inquiry, the inquiry is able to deal with such matters more simply, having a wider discretion to restrict attendance at an inquiry and to restrict disclosure or publication of evidence or documents. There are no specific requirements for chairs of non-statutory inquiries to take steps to ensure the public and media are able to attend hearings, access simultaneous transmissions or are able to access evidence and documents provided to the inquiry. As discussed in detail in an earlier article,[81] ministers on occasions appear to be choosing to sidestep the use of the 2005 Act, including its presumption that inquiries will be held in public, in favour of convening non-statutory inquiries. This has given rise to speculation that some such decisions may have been motivated by a wish to conceal or suppress some aspects of the truth from the public.[82]

The first three of Jaconelli's six presumptive elements of open justice in the court system are: the provision of adequate facilities for attendance of members of the public and representatives of the media; the right of those in attendance to report the proceedings; and the availability of documents produced for the purposes of the trial for inspection by the public. These are also key elements of open justice in the public inquiry process. All three areas may be the subject of restrictions.

Restrictions may result in the exclusion of all or part of the public from the oral hearings (or all or some core participants or legal representatives). [83] Consequently, parts of an inquiry may be conducted in closed hearings, with access restricted to the inquiry team and those giving the sensitive evidence, or in private hearings, where the chair decides who may be privy to the information and might, for example, include witnesses with a common interest. Though public access may be restricted to the hearings themselves, or by way of simultaneous transmission of the proceedings, there may still be access to the evidence in terms of witness statements and transcripts of witness evidence at a later stage. Disclosure or publication of documents and evidence may be restricted, for example, to a witness or class of witnesses, or to core participants and their legal

[79] 2005 Act, s19(4) –(5)
[80] See the consideration in the Undercover Policing Inquiry *Restriction Orders: Legal Principles and Approach Ruling* 3 *3* May 2016 available at www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf para 32
[81] Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67, 2 NILQ 209-229
[82] See question of Baroness Buscombe, oral evidence taken before the HL Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) 10 July 2013
Q36
[83] 2005 Act, s19(1)(a)

advisers, with further restrictions on their wider publication.[84] An alternative to a refusal to disclose a document is the use of redactions and ciphers.[85]

Restrictions apply also to the press. Article 10 ECHR protects the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. It is a qualified right, however, since it carries with it duties and responsibilities and it has to be balanced with, amongst other things, the risk of harm to the public interest. The media has no general right of access under Article 10 to information held by the state which the state is unwilling to disclose,[86] nor does it have a right of access to inquiry proceedings properly held in private.[87] Public inquiries are not 'public authorities' within the meaning of the Freedom of Information Act (FOIA)[88] and therefore the FOIA does not apply. Many public authorities that participate in public inquiries, such as government departments and NHS Trusts, are caught by the provisions of the FOIA and are susceptible to FOI requests.[89] They may hold documents connected to the inquiry such as correspondence with the inquiry, evidence and witness statements. S32(3) exempts information from the right to disclosure where it is held only by virtues of being contained in any document placed in the custody of a person conducting an inquiry,[90] or created by a person conducting an inquiry, for the purposes of the inquiry.

During the Undercover Policing Inquiry, the media emphasised the importance of the open justice principle, the role of the media as the public's eyes and ears and its role as public watchdog. Submissions were made, with reference to Art 10 ECHR, that the media should have access to the process by which the chair determines applications for restriction orders during that inquiry, so that submissions could be received before the order was made, and also to closed material submitted in support of those applications, on terms of confidentiality.[91] The chair, Sir Christopher Pitchford,[92] ruled that the approach under Article 10 added nothing to the approach to restriction orders under s19, stating "I can see no arguable basis for giving to the media rights of access not enjoyed either by the public in general or core participants in particular."[93]

The powers under s19, or similar restrictions imposed in non-statutory inquiries, do not restrict the evidence being seen and heard by the inquiry itself, but its onward disclosure or publication. However, restricting public access to that evidence has a huge impact on

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84 Ibid s19(1)(b) See also Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.30 .

85 See the discussion in R v Lord Saville of Newdigate Exp A [2000] 1 WLR 1855**;** [1999] 4 All ER 860 where it was held that the public nature of the inquiry would be preserved despite the maintenance of anonymity by the use of ciphers in place of the names of soldiers giving evidence to the Bloody Sunday Inquiry

86 Kennedy v the Charity Commission 2014 UKSC 20, [2015] 1 AC 455

87 R (Persey) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 371 (Admin) [2003] QB 794) at paragraphs 48-59; R (Howard) v Secretary of State Health [2002] EWHC 396 (Admin), [2003] QB 830 at paragraph 110

88 Schedule 1 Freedom of Information Act 2000

89 2005 Act, s1

90 Though the definition of Inquiry in s32(4) (c) refers only to statutory inquiries. As to practical issues arising in respect of s32 exemptions under the FOIA, see Eversheds written evidence para 49 House of Lords Select Committee on the Inquiries Act 2005 Written and Corrected Oral Evidence <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>

91 Referring to Article 10 ECHR and Guardian News and Media Limited and others v Incedal and another [2014] EWCA Crim 1861, [2015] 1 Cr App R 4 and Guardian News and Media Limited and others [2016] EWCA Crim 11

92 A Lord Justice of Appeal

93 Undercover Policing Inquiry, *Restriction Orders: Legal Principles and Approach Ruling* <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> paras 201-209

the transparency of the proceedings and perceptions of independence, which are vital to public trust and confidence in the process.

Open Justice, Witnesses and the Common Law Duty of Fairness

Jaconelli's remaining three presumptive elements of open justice in the court system relate to the identity of witnesses and are: that names of participants, including witnesses, should be openly available; the trial take place in the presence of the accused; and that the accused be entitled to confront his accusers face to face.[94] At common law the default position is that witnesses in civil or criminal judicial proceedings give evidence in public using their true identity, and the defendant or other party is entitled to confront their accuser.[95] However, CPR 39.2(4) Civil Procedure Rules 1998 provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. In criminal proceedings, s86 Coroners and Justice Act 2009 provides that a court may, in certain circumstances, make a witness anonymity order.

For public inquiries too there is a balancing act at common law between the competing interests of witnesses, their subjective fears, impact on their health, and any other factors which might make it unfair to require the witness's identity to be exposed, and the effect this would have on the fairness and transparency of the inquiry.[96] The subject matter of many inquiries can be very sensitive, addressing issues such as health or abuse, or can result in witnesses fearing for their life or security if they are to appear in public before the inquiry. A restriction notice or order made in respect of a 2005 Act inquiry, or ruling of a chair during a non-statutory inquiry, may restrict the disclosure of the name and personal details of a witness, permitting them to give evidence anonymously or from behind a screen.

This balancing act has been challenged a number of times before the courts, notably during the Bloody Sunday Inquiry[97] where soldiers sought anonymity before the inquiry, and to give evidence in an alternative venue, on grounds of security. [98] In *re Officer L and Others,*[99] brought during the later *Robert Hamill Inquiry*[100], the House of Lords reviewed the obligations of an inquiry to a witness under Article 2 ECHR (that everyone's right to life shall be protected by law) and then the common law. It held that the test under Article 2 is whether, in the absence of protective measures, when viewed objectively, a risk to the witness's life would be created, or a pre-existing risk materially increased; the risk must be "real and immediate" and stated the threshold is high. It held that the common law duty of fairness to witnesses entailed consideration of concerns other than the risk to life; subjective fears, even if not well-founded, could be taken into account, particularly if that has an adverse impact on their health. The ruling

[94] Which may be prevented by eg the erection of a screen or use of a video link, which would prevent the giving of evidence before the public as well as the accused.
[95] See, for example, Archbold Criminal Pleading Evidence and Practice (2017 Edn) para 4.3 and 4.5a
96 See Robert Francis written evidence paragraph 57- 58 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>
[97] A pre-2005 Act inquiry into 'the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day'
[98] R v Lord Saville of Newdigate, ex p A [2000] 1 WLR 1855 ('Saville 1) and R(A) v Lord Saville of Newdigate [2001] EWCA Civ 2048, [2002] 1 WLR 1249 ('Saville 2')
[99] [2007] UKHL 36, [2007] 1 WLR 2135
[100] Into the death of Robert Hamill and the acts and omissions of the Royal Ulster Constabulary 2004-2011, converted to a 2005 Act Inquiry.

of the *Undercover Policing Inquiry* summarised the common law test[101] as requiring: a measurement of the public interest in the openness of the inquiry; the nature, content and importance of the evidence; the contribution if any that identification of the witness would make to public confidence in the inquiry; and the nature of the personal interests of the witness, including the actual or perceived risk of harm to that witness.[102]

In addition to obligations under Article 2 and the common law principles of fairness, applications for anonymity might be made by reference to Article 3 ECHR[103] and Article 8 (the right to respect for his private and family life, his home and his correspondence). S17(3) 2005 Act requires the chair, when making any decision as to the procedure or conduct of an inquiry, to act with fairness; there is no difference between the standard of fairness to be applied under section 17(3) and at common law.[104]

In practice, whilst requests for anonymity are relatively frequently made, they are not readily granted. When they are granted, the identity of the witness is withheld from the public, though not necessarily the evidence itself. The evidence in support of the decision might be also be subject to a restriction notice or order.

The granting of anonymity may be challenged because of lack of openness. The granting of anonymity to police witnesses has been a highly controversial issue during the Undercover Policing Inquiry.[105] Some of the women who had unknowingly entered into long term relationships with undercover police officers have indicated that they will refuse to cooperate with an inquiry that is held largely in secret. Stephen Lawrence's family called for the undercover police officers who had spied on them while they pressed for a full investigation into Stephen's murder to be named and indicated that they too will not cooperate with an inquiry they consider is not sufficiently open.[106] The chair of the Inquiry[107] decided against granting blanket anonymity to all undercover officers, determining that applications for restriction orders would be heard on a case by case basis.

Similarly, the *Azelle Rodney Inquiry* illustrates how applications for anonymity are heard on a case by case basis, balancing the need to protect witnesses and the need for openness. The inquiry investigated the circumstances by which Azelle Rodney was shot dead by an armed officer of the Metropolitan Police in 2005. The chair refused anonymity and screening to two officers, granted both to the officer who had fired the fatal shot, and granted anonymity to the remaining firearms officers, who were referred to by ciphers, but refused them screening. He granted anonymity and screening to the intelligence officers, and refused both to the surveillance officers.[108] Screened witnesses

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[101] From consideration in other Northern Ireland cases notably Re A and others' Application for Judicial Review (Nelson Witnesses) [2009] NICA 6; Re:Witnesses A, B, C, K and N's Application for Judicial Review [2007] NIQB 30; and Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy (unreported)

[102] Undercover Policing Inquiry, *Restriction Orders: Legal Principles and Approach Ruling* <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> paras para 211

[103] That no-one shall be subjected to torture, or to inhuman or degrading treatment or punishment. Both the chair of the *Baha Mousa* and *Undercover Policing Inquiries* concluded that the threshold test for Article 3 ECHR should be the same, one of objectively verified immediate risk (of torture, inhuman or degrading treatment or punishment) ibid para 176

[104] Ibid para 210

[105] Into undercover police operations conducted by English and Welsh police forces in England and Wales

[106] <www.theguardian.com/uk-news/2015/jul/15/doreen-lawrence-name-undercover-police-spied-family> and 'The Today Programme' (BBC Radio 4, 3 May 2016) respectively

[107] Lord Justice Pitchford

[108] Summarised in R (on the application of E) v Chairman of the Inquiry into the Death of Azelle Rodney Inquiry [2012] EWHC 563 (Admin) para 9-11

were visible only to the Chair, Counsel to the Inquiry, counsel to the core participant, the deceased's mother, and a friend or relative notified in advance to the police and also attendant staff.

An application was made by fourteen of the Metropolitan Police officers for permission to seek judicial review of the Chair's decision to refuse their application that they be screened. In refusing permission to seek judicial review, Lord Justice Laws stated "there is, in my judgment, a very pressing public interest in openness on the facts of this case. It concerns, after all, a man sitting in a car with no weapon in his hand who has eight shots fired at him at close range causing his death… It seems to me the Chairman was fully entitled to put what he called a premium on achieving as public an Inquiry as possible, "so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained 'cover up'"".[109]

Criticism of the Minister's Power to Restrict Access

The introduction of the minister's power to issue a restriction notice under the 2005 Act, in addition to the chair's power to make a restriction order, was highly controversial.[110] The powers vested in the minister in this respect go beyond those of other commonwealth jurisdictions.[111] A major role of public inquiries is to hold those in authority to account, and it is often the actions of the Government itself, or the minister's own department, that are under scrutiny during a public inquiry. A minister's power to restrict attendance at the inquiry, or the disclosure or publication of evidence or documents provided to the inquiry, by issuing a restriction notice at any time before or during the course of an inquiry, gives rise to a clear conflict of interest. Many have argued that the power should only be exercisable by the chair.

The 2004 Public Administration Select Committee report, *Government by Inquiry,*[112] criticised the minister's wide powers to restrict public access to inquiries, stating "This subverts accepted presumptions of openness and public interest and we recommend it should be reversed."[113] The Joint Committee on Human Rights stated "we remain of the view that the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation."[114]

The 2013-14 House of Lords Select Committee, that provided post-legislative scrutiny of the 2005 Act, expressed similar concerns. It noted that the predicted collapse in public confidence in 2005 Act public inquiries, resulting from the powers given to ministers under the Act including the power to restrict access, had not materialised.[115]

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[109] [2012] EWHC 563 para 26

[110] See, for example, the letter from Judge Peter Cory (a former Justice of the Supreme Court of Canada and chair of the *Cory Collusion Inquiry*) to US Congressman Chris Smith www.patfinucanecentre.org/collusion-pat-finucane/canadian-judge-peter-cory-slams-finucane-inquiry-legislation and the letter from Lord Saville of Newdigate (former Justice of the Supreme Court of the United Kingdom and chair of the *Bloody Sunday Inquiry*) to the Under-Secretary of State for Constitutional Affairs, quoted in HC Deb, 15 March 2005, vol 423, col 189

[111] Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.28

[112] HC 2004-5, 51-I

113 Ibid para 99

[114] Joint Committee on Human Rights, (8th Report, Session 2004–05, HL Paper 60, HC 388)

[115] Eg the family of Patrick Finucane, a Northern Ireland solicitor, initially opposed the establishment of a 2005 Act inquiry into his murder by paramilitaries and collusion by the state because of the s19 power to impose restrictions on the disclosure and publication of evidence. The family subsequently changed its position, having

Nevertheless the Select Committee recommended that only the chair should be allowed to restrict access to an inquiry on the basis that the chair's power to issue a restriction order is sufficient.[116]

The Government rejected the suggestion stating "Ministers must have the power to issue notices imposing restrictions on attendance at an inquiry and/or on the disclosure or publication of any evidence or documents provided to an inquiry. They will understand the nature of national security and other sensitive material. It is not appropriate that this power is ceded to the inquiry chairman alone." In the subsequent House of Lords debate, the Government's rejection was highly criticised. Baroness O'Loan weighed up the need to protect national security with the need for public administration of justice,[117] warning that

> "There is a temptation in any organisation to cover up its wrongdoing. We have seen it across so many professions and institutions. Governments will not be immune to that temptation and those who have advised them and their successors may seek to cover up past wrongdoing to protect what they perceive to be the stability of the present…" adding
>
> "The reality is that an inquiry that is deeply immersed in what might be millions of pages of documents is much better placed to assess the relevance of documentation and capable of protecting that which requires to be kept secret than the Government and their advisers."

Whilst the power to make a restriction notice has not been frequently exercised, the fact the power exists, and has on occasions been used,[118] has undermined the perception of the independence of public inquiries convened under the 2005 Act.

The Report -Publication and Withholding Material

The final area that will be addressed, and is similarly controversial, is the minister's power to withhold evidence when the report is published. A public inquiry has no power to rule on or to determine any person's civil or criminal liability[119] but, at the conclusion of an inquiry, a report is produced by the chair or panel and is delivered to the minister who convened the inquiry. [120] The report contains: the facts determined by the inquiry; where its terms of reference required it to make recommendations, its recommendations;[121] and anything else that the chair or panel consider to be relevant to the terms of reference.[122] The report must then be published and laid by the minister before Parliament.[123]

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seen the 2005 Act in practice and having received undertakings regarding the use of restriction notices. However, the government ultimately decided to hold an independent review rather than the public inquiry that had been promised to the family. The family brought judicial review proceedings to challenge that decision, which were unsuccessful.

116 HL Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 206

117 HL Deb 19 March 2015 vol 760 c 1165

[118] Eg there were four restriction notices given by the minister to the chair of the Litvinenko Inquiry

[119] 2005 Act, s2(1)

[120] A duty for statutory inquiries under 2005 Act, s24

[121] Ibid, s24

122 Ibid s24(1)

123 Ibid Ss 24 and 25 and Maxwell v Department of Trade and Industry [1974] QB 523 Following dissatisfaction over Lord Denning's inquiry into the Profumo affair

The starting point for 2005 Act inquiries is that the party responsible for publication has a duty to publish the report in full.[124] However, drawing direct parallels to the provisions relating to restriction notices and orders, material may be withheld from publication to such an extent as required by law or considered necessary in the public interest.[125] Regards must be had to matters such as: the extent to which doing so might inhibit the allaying of public concern; would reduce the risk of death or injury, damage to national security, international relations, or the economic interests of the UK; or certain conditions as to confidentiality.[126] The default position is that it is the minister who receives the report and is required to arrange for its publication (and may therefore withhold information), unless he or she has notified the chair before the inquiry commences that the chair is to have responsibility, or the chair has subsequently agreed to accept responsibility on being invited by the minister to do so. [127]

Establishing the facts, allaying public concern, and holding those in authority to account are some of the key purposes of a public inquiry. In particular, where the actions of the minister's department or the Government itself are under scrutiny, withholding material from the report has the potential to seriously undermine and damage public confidence not only in that inquiry, but also in the public inquiry process as a whole. Where the chair is responsible for publication, there is at least transparency; the public sees the report in the form delivered to the minister. However, where the minister is responsible for publication, and potentially for redacting information from the final report, it raises a number of additional and serious concerns such as lack of independence, the Government being given advantage over others through being given advance sight of the report, and the potential for action to be taken, or at least appear to be taken, out of political self-interest.

When the Inquiry Bill was introduced, the Joint Committee on Human Rights expressed concern that the minister's power to withhold material from publication in the public interest is wide enough to compromise the independence of an inquiry.[128] It also raised concerns specifically over inquiries designed to fulfil the Article 2 obligation to hold an effective and independent investigation, asserting that, in such cases, responsibility for publishing the report should rest with the chair.[129] No amendment was made to the Bill to this effect. The 2004 Public Administration Select Committee report on the effectiveness of inquiries stated

> "It is important that ministers should not manipulate the publication date of an inquiry report for their own ends or undermine a parliamentary debate on its findings by limiting access to it, as was notably the case with Sir Richard Scott's report on Arms to Iraq". It noted, that
>
> "recent practice has been good, with chairs keeping a tight hold on availability of the report to all the parties and making their own press statements on publication".

However, it recommended a presumption should be included in the Bill that chairs would handle publication,[130] which was rejected. Subsequently, the House of Lords Select Committee, at the post-legislative scrutiny stage, recommended that, whoever is responsible for publication of the inquiry report, s25(4) be amended so that, save in

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[124] 2005 Act, s25(3)
[125] Ibid s25(4)
126 Ibid ss25(5) and (6)
127 Ibid s25(2) "before the setting-up date"
[128] Joint Committee on Human Rights, (8th Report, Session 2004–05, HL Paper 60, HC 388)Para 3.11
[129] Ibid para 3.13
[130] Ibid paras 136-137

matters of national security, only the chair has the power to withhold material from publication. That recommendation too was rejected[131].

It is the potential for interference, as much as the reality itself that undermines public confidence in the process. When publication of the Chilcot Report[132] was imminent, and the report was to be released first to the Government to allow for national security checking prior to its publication, there was evidence of renewed mistrust in the Inquiry itself. Newspaper articles expressed concern over the process and the potential for censorship.[133] Scepticism was also expressed during a Commons debate with Jeremy Corbyn[134] stating "I think I shall be disappointed when it is published. I suspect that it will be full of redactions and that we will have to read a million words before we discover which bits have been redacted."[135] In fact the report was subsequently published without any redactions at all, but earlier distrust about apparent undue secrecy, and the potential for interference with the report before publication, had undermined and damaged public trust in the process.

Conclusion

A public inquiry is a hybrid of a political and legal process, and the need for openness and public scrutiny essential for democratic accountability and for open justice demands that a public inquiry is held as publicly as possible. The presumption that inquiries convened under the 2005 Act will be held in public can be, and often is, subject to restrictions and there is no such presumption for non-statutory inquiries. Each of the number of functions served by a public inquiry may be undermined by such restrictions. Public confidence in the findings or recommendations of an inquiry is diminished where evidence on which they are based has not been made publicly available. Restricting access to oral hearings impedes the potential for catharsis for witnesses who are anxious for their voice to be heard. The decision to hear evidence in secret frequently gives rise to the suspicion that it has been motivated by a desire to conceal information or avoid accountability.

The fact that those restrictions may be imposed not only by the chair to the inquiry but also by the minister who convened the inquiry raises particular cause for concern. It is often the Government itself, or the minister's own department, that is under scrutiny, which gives rise to a clear conflict of interest. When a decision is made by the minister to restrict public access to an inquiry, it is difficult to avoid allegations that the decision has been motivated by political self-interest, undermining public confidence in the independence and integrity of the public inquiry. Despite repeated calls for change from the public, and repeated recommendations from successive Parliamentary committees that the power of ministers to restrict public access to public inquiries be abrogated, no changes have been made.

There will always be tensions between the demand for public scrutiny and open justice on the one hand and conflicting pressures such as the duty of fairness to witnesses and the protection of national security on the other. There is no doubt that, in certain circumstances, restrictions on the extent to which public inquiries are conducted in public are necessary. However, public inquiries are a major form of administrative

[131] Ministry of Justice, Government Response to the *Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 70
[132] The report of the *Iraq Inquiry*
[133] Chris Ames 'Will the Chilcot report tell the full story? It's on a knife edge' *The Guardian* (London, 18 April 2016) <www.theguardian.com/commentisfree/2016/apr/18/chilcot-report-full-story-iraq-war-inquiry-tony-blair-saddam-hussein>
[134] Prior to being elected Labour Leader in September 2015
[135] HC Deb, 29 January 2015, vol 591, col 1072

accountability and are, by definition, convened for the benefit of the public as a whole. Each time a restriction is imposed on the public nature of an inquiry, there is a risk that public confidence in the inquiry will be undermined, reducing the weight and impact of its report and its ability to address public concern; the effect is cumulative. It is vital that, whilst maintaining a fair balance between the personal rights of individuals and the public, conducting public inquiries as openly and publicly as possible remains a paramount objective.